Supreme Court, U.S.
FILED

03 - 20 JUN 26 2003

No. ____ OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

FLORIDA MUNICIPAL POWER AGENCY,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

PETITION FOR A WRIT OF CERTIORARI

FREDERICK M. BRYANT
General Counsel for FLORIDA MUNICIPAL POWER AGENCY
Post Office Box 3209
Tallahassee, FL 32315-3209
(877) 297-2012

ROBERT A. JABLON *
DANIEL I. DAVIDSON
PETER J. HOPKINS
SPIEGEL & MCDIARMID
1333 New Hampshire Ave., NW
Washington, DC 20036
(202) 879-4000

* Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTION PRESENTED

This case presents the following question concerning review of administrative agency decisions:

When an agency erroneously states that a party failed to present argument on the key issue that was before it for decision, may a reviewing court affirm the agency's decision based on the court's assessment that although the court "has no idea" of the meaning of the agency's statement, the agency did in fact consider and reject the party's arguments, contrary to the agency's clear assertion that it did not?

PARTIES TO THE PROCEEDING

Florida Municipal Power Agency

Federal Energy Regulatory Commission

Florida Power & Light Company

The Florida Municipal Power Agency is a non-profit, public agency, established by Florida law and is owned by its 29 member cities. As such, it is not covered by Court Rule 29.6 as referenced in Court Rule 14.1(b).

TABLE OF CONTENTS

Page

QUESTION PRESENTED I

PARTIES TO THE PROCEEDING II

TABLE OF AUTHORITIES IV

OPINIONS AND ORDERS BELOW 1

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 5

I. THE COURT OF APPEALS IMPROPERLY SUBSTITUTED ITS GUESS AS TO THE COMMISSION'S BASIS FOR DECISION FOR THE COMMISSION'S CLEAR STATEMENT 7

II. SUMMARY REVERSAL IS APPROPRIATE 11

CONCLUSION 12

TABLE OF AUTHORITIES

CASES

Burlington Truck Lines, Inc. v. United States, 371 U.S. 156 (1962) 7

California Ind. Sys. Operator Corp., 103 F.E.R.C. ¶ 61,114 (2003) 11

Entergy Services, Inc. v. FERC, 319 F.3d 536 (D.C. Cir. 2003) 10

FPC v. Idaho Power Co., 344 U.S. 17 (1952) .. 7, 11

FPC v. Texaco, 417 U.S. 380 (1974) 7

FTC v. Morton Salt Co., 334 U.S. 37 (1948) 7, 11

Motor Vehicle Mfrg. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983) 7

Natural Resources Defense Council v. EPA, 822 F.2d 104 (D.C. Cir. 1987) 8

NLRB v. Universal Camera, 340 U.S. 474 (1951) 6

SEC v. Chenery Corp., 318 U.S. 80 (1943) 7, 11

United States v. Chicago, M., St. P. & P.R. Co., 294 U.S. 499 (1935) 11

UNITED STATES CONSTITUTION, STATUTES, AND RULES

U.S. Const. amend. V 1, 6

28 U.S.C. § 1254(1) 1

Administrative Procedure Act, 5 U.S.C. §706 .... 1, 6

Federal Power Act, Section 206, 16 U.S.C. § 792 *et seq.* :

16 U.S.C. § 824e 1,4
16 U.S.C. § 824j 1,4
16 U.S.C. § 824k 1,4
16 U.S.C. § 824*l* 2
16 U.S.C. § 824*l*(a) 3
16 U.S.C. § 824*l*(b) 4

S.Ct.R.13. 1

OTHER AUTHORITIES

Remedying Undue Discrimination through Open Access Transmission Service and Standard Electricity Market Design, 67 *Fed.Reg.* 55,451 (proposed July 31, 2002) (to be codified at 18 C.F.R. pt. 35) 12

OPINIONS AND ORDERS BELOW

The decision of the United States Court of Appeals for the District of Columbia Circuit is reported at *Florida Mun. Power Agency v. FERC,* 315 F.3d 362 (D.C. Cir. 2003), and is reprinted at Petitioner's Appendix (Pet. App.) A-1 to A-13. Rehearing *en banc* was denied on March 28, 2003 in an unpublished order, reprinted at Pet. App. C-1 to C-2. Federal Energy Regulatory Commission (FERC) *Final Order Under Sections 211 and 212 of the Federal Power Act Directing Network Transmission Service and Establishing Rates, Terms and Conditions* is reported at *Florida Mun. Power Agency v. Florida Power & Light Co.*, 67 F.E.R.C. ¶ 61,167 (1994), and is reprinted at Pet. App. B-71 to B-112. The FERC's first rehearing decision, *Order Granting Clarification in Part, Denying Rehearing, and Accepting Compliance Filing as Modified*, is reported at *Florida Mun. Power Agency v. Florida Power & Light Co.*, 74 F.E.R.C. ¶ 61,006 (1996), and is reprinted at Pet. App. B-9 to B-70. Its second rehearing decision, *Order Dismissing and Denying Petitions for Rehearing,* is reported at *Florida Mun. Power Agency v. Florida Power & Light Co.*, 96 F.E.R.C. ¶ 61,130 (2001), and is reprinted at Pet. App. B-1 to B-8.

BASIS FOR JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1) and Court Rule 13. An order denying FMPA's Petition for Rehearing *en banc* was issued on March 28, 2003, Pet. App. C-1, and the court's mandate was issued on April 15, 2003.

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

U.S. Const. amend. V, is reprinted at Pet. App. E-22.

Federal Power Act, Section 206, 16 U.S.C. § 824e, is reprinted at Pet. App. E-1 to E-4.

Federal Power Act, Sections 211-12, 16 U.S.C. §§ 824j-k, are reprinted at Pet. App. E-4 to E-16.

Federal Power Act, Section 313, 16 U.S.C. § 825l, is reprinted at Pet. App. E-16 to E-18.

Administrative Procedure Act, 5 U.S.C. § 706, is reprinted at Pet. App. E-20 to E-21.

STATEMENT OF THE CASE

The Federal Energy Regulatory Commission ("FERC") denied relief to Petitioner Florida Municipal Power Agency ("FMPA"), claiming that FMPA had not presented any argument addressed to the central issue for decision. Pet. App. B-1. The FERC's statement was admittedly erroneous. On review, the Court of Appeals for the District of Columbia recognized that the FERC's statement as to the absence of argument was incomprehensible:

> So what did FERC mean when it said that FMPA neither argued nor presented sufficient evidence of integration? *We have no idea.*

Pet. App. A-9 (emphasis supplied). Nonetheless, the court of appeals affirmed, because based upon *its* review of the record, *it* determined that the FERC had considered and rejected FMPA's arguments, even though the agency itself had stated that FMPA had presented no such argument. *Id.*

The proceeding began in 1993, when the FERC ordered Florida Power & Light Company ("FPL"), a dominant transmission owner, to sell FMPA network transmission services. Pet. App. B-156 to B-157. FMPA both purchases transmission services from and competes with FPL for electricity sales. Pet. App. B-115 to B-130. FMPA contended that it or its member cities own transmission that is useful to the FPL transmission grid, and claimed an entitlement under the Federal Power Act to rate credits or

other rate recognition for this transmission. Pet. App. H-1 to H-30.

In 1994, the FERC held that FMPA would be entitled to rate credits for FMPA "transmission facilities that will operate as part of the integrated transmission system," Pet. App. B-99, but in 1996 the FERC denied FMPA credits. Pet. App. B-25. FERC held that FMPA's transmission was not "integrated" with FPL's transmission grid. *Id.*

FMPA applied for rehearing, arguing and citing evidence that its transmission meets the FERC's standards for "integration." Pet. App. H-1 to H-30. Rehearing applications are part of the FERC's decisional process and are required by statute before a party can seek judicial review. FPA, § 313, 16 U.S.C. 825l(a); Pet. App. E-16 to E-17.

In its 2001 rehearing order, the FERC denied FMPA relief, stating:

> FMPA has not demonstrated, *nor does FMPA even argue*, that its facilities meet the [integration] test [for determining whether customer facilities are entitled to credits].

Pet. App. B-6 (emphasis supplied).

This statement, admittedly in error, can only be attributed to sloppy staff work. As all parties conceded, FMPA presented a myriad of evidence and arguments on rehearing addressed to integration and the FERC's integration test.[1] During the court of appeals' review of the FERC's order,

---

[1] *See generally* Pet. App. H-1 to H-30; J-1 to J-28; I-1 to I-25. Appendix A to FMPA's Initial Brief to the court of appeals is an index of FMPA's exhibits and direct testimony showing the "integration" of FMPA's and FPL's transmission. Pet. App. G-1 to G-10.

neither the FERC nor FPL attempted to defend the accuracy of the FERC's statement that FMPA did not argue on rehearing the integration of its transmission. *See* Pet. App. K-2; K-4.

The FERC's finding that FMPA had not presented argument on integration was incontestably significant to its decision to deny FMPA credits. In discussing the FERC's order, Commissioner (and soon to become Chairman) Wood said that the integration test is "a pretty easy standard," that it "looks like FMPA has such [integrated] facilities in the Florida region," and that he "is not sure why [a showing of additional benefits from FMPA's transmission] wasn't made in this case." Pet. App. F-1 to F-2.

The court of appeals affirmed the Commission,[2] stating:

> So what did FERC mean when it said that FMPA neither argued nor presented sufficient evidence of integration? *We have no idea.* The Commission's brief provides no explanation, nor was agency counsel able to do so at oral argument. This enigma is not fatal, however, for under our deferential standard of review, we uphold agency decisions if supported by substantial evidence, 'notwithstanding their expository shortcomings.' *Pan-Alberta Gas, Ltd. v. FERC,* 251 F.3d 173, 176 (D.C. Cir. 2001).

---

[2] The court of appeals had jurisdiction pursuant to the Federal Power Act, Section 313(b), 16 U.S.C. §825l(b) (2000). The FERC had jurisdiction under the Federal Power Act, Sections 206 and 211-212, 16 U.S.C. §§ 824e, j-k. Pet. App. E-1 to E-16.

Pet. App. A-9 (emphasis supplied). Ignoring the FERC's clear admission that it had not considered FMPA's arguments, (the agency having held erroneously that FMPA had presented no such argument), the court of appeals found, "Other statements in [the 2001 Rehearing Order], however, indicate that FERC understood FMPA's arguments and its evidence, but found them insufficient..." Pet. App. A-9. Rehearing *en banc* was denied. Pet App C-1 to C-2.

FMPA petitions for review by this Court.

REASONS FOR GRANTING THE WRIT

Supreme Court review is warranted because the court of appeals' decision overturns basic and previously well understood requirements for the review of administrative agency decisions: that an agency decision must be affirmed or overturned based on the grounds stated by the agency in its decision. This case is also worthy of the Court's review because the decision fundamentally changes the role of courts and agencies. The court abandons the clear import of agency language and substitutes its guess as to the basis of the exercise of agency discretion. If permitted to stand, the D.C. Circuit's decision will be a large step down a path that fundamentally undermines the proper role of judicial review of agency actions.

The court of appeals recognized that the FERC's statement "that FMPA neither argued nor presented sufficient evidence of integration" was wrong. Pet. App. A-9. The court purports to find contradictory language that supports an interpretation, albeit a strained interpretation, that the FERC did consider FMPA's arguments. *Id.* Read most generously, the court's review shows ambiguity as to whether the FERC considered FMPA's arguments, or, instead, as FERC said,

whether it did not know that such arguments existed.[3] Even if there is ambiguity, a remand was required so that FERC could say what it meant rather than have a reviewing court determine what was in the FERC's mind. Parties have a right to know that their evidence and arguments have been heard.

The conflict between the proper function of a court reviewing an agency decision and what the court of appeals in fact did is most starkly illustrated by the following hypothetical. Assume at one point in its opinion the agency had stated, "We have reviewed the petitioner's arguments on rehearing concerning issue X and find them lacking for reasons stated in our prior order," and elsewhere it had stated, "We deny rehearing because petitioner has raised no arguments on rehearing concerning issue X." The reviewing court is not allowed to resolve this conflict (necessarily based on its own intuition or guess), but must remand to the agency. Even giving the court of appeals every benefit of the doubt, this was the situation before the D.C. Circuit. In resolving the conflict between the FERC's clear language that FMPA did not argue integration and the (marginal) possibility based on other language in the FERC's opinion that the FERC considered FMPA's arguments, the court finds that the FERC did consider FMPA's arguments. In doing so, it trespassed on the duty of the agency to render an intelligible, reasoned decision and substituted its own view for the (unknowable) view of the agency.

---

[3] Where the agency does not know what was in the record, the decision cannot be said to have been based upon the "whole record," as the Administrative Procedure Act requires, and must be considered, in the most literal sense, to be "arbitrary" and "capricious." Administrative Procedure Act, 5 U.S.C. § 706; Pet. App. E-20 to E-21. *See* U.S. Const. amend. V, Pet. App. E-22; *NLRB v. Universal Camera,* 340 U.S. 474, 482 (1951).

I. THE COURT OF APPEALS IMPROPERLY SUBSTITUTED ITS GUESS AS TO THE COMMISSION'S BASIS FOR DECISION FOR THE COMMISSION'S CLEAR STATEMENT.

Reviewing courts must affirm or remand based on the validity of the reasons given by the agency. Heretofore, it has been clear that agencies speak only through their decisions and cannot be affirmed based on what they have not stated. *E.g., SEC v. Chenery Corp.*, 318 U.S. 80 (1943); *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156 (1962); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983). Where agency decisions are unclear, courts or counsel may not supply possible answers to cure the deficiency. *Burlington Truck Lines, Inc.*, 371 U.S. at 168 ("The courts may not accept appellate counsel's *post hoc* rationalizations for agency action."); *Chenery Corp.*, 318 U.S. at 87 ("The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based."); *FPC v. Texaco*, 417 U.S. 380, 397 (1974) (despite Commission's assertions of intended meaning, ambiguity in the order required remand). Where an agency's decision is in error, it is the duty of the courts to lay the error bare and remand to the agency *so that the agency may correct its error*, not to decide *itself* what the agency should have or must have meant. "[T]he guiding principle . . . is that the function of the reviewing court ends when an error of law is laid bare. At that point the matter once more goes to the Commission for reconsideration." *FPC v. Idaho Power Co.*, 344 U.S. 17, 20 (1952). "For purposes of affirming no less than reversing its order, an appellate court cannot intrude upon the domain which Congress has exclusively entrusted to an administrative agency." *Chenery Corp.*, 318 U.S. at 88. *Burlington Truck Lines, Inc.*, 371 U.S. at 169; *Idaho Power Co.*, 344 U.S. at 21; *FTC v. Morton Salt Co.*, 334 U.S. 37, 55 (1948). The court of appeals' decision violates these basic precepts.

In this case, the nation's preeminent court of appeals on administrative matters chose to disregard a clear statement of the FERC, which required remand, that a party had not presented argument when it had. After stating that it had "no idea" of what the Commission's statement meant, the court proceeded to search the remainder of the Commission's order and the record in order to construct its own rationale (*i.e.*, that "FERC [had] understood FMPA's arguments") to support denial of the petition for review. Pet. App. A-9 to A-13. This mutilation of the fundamental rule that an administrative agency can be affirmed only on the basis it has articulated and that the court may not construct its own rationale for affirmance requires reversal in order to preserve basic tenets of administrative law.

Here, the FERC plainly stated in its order on remand "FMPA [does not] even argue, that its facilities meet the test" of integration. Pet. App. B-6. The court of appeals admits that on the question of what the FERC meant "when it said that FMPA neither argued nor presented sufficient evidence of integration," it has "no idea." Pet. App. A-9. At this point a remand was required. Agency action "is arbitrary and capricious if the agency ... ignores important arguments..." *Natural Resources Defense Council v. EPA,* 822 F.2d 104, 111 (D.C. Cir. 1987).

The FERC's opinion is unequivocal that FMPA's petition for rehearing presented no argument on the crucial point for decision. Pet. App. B-6. No party disputes the fact that such argument was presented. A decision rendered in total ignorance of a party's argument certainly requires a remand. However, referring to the FERC's recitation of the history of the proceedings, a recitation which occurs prior to what the Commission terms the "discussion" of the petition for rehearing on which it ruled, the court finds that the FERC's plain statement of ignorance that FMPA had presented no

argument on the critical issue was of no moment because the *court* finds "that FERC understood FMPA's arguments and its evidence." Pet. App. A-9. Based upon its divination of this asserted fact, the court finds that there was "substantial evidence" in the record to support the Commission's result. *Id.* Of course, after considering all the evidence and arguments, the FERC might have reached the same result – or it might have ruled differently. One does not know, which is why a remand is required. The court's action of not remanding when there is error or unresolvable ambiguity, changes profoundly the role of courts and agencies.

In its opinion, the court of appeals recognizes that the FERC's statement that "FMPA has not demonstrated, nor does FMPA even argue" integration was incorrect. Pet. App. A-9. The court said that the statement was not explained in "the Commission's brief" nor "was Commission counsel able to do so on oral argument," but it then asserts, "This enigma is not fatal, however, for under our differential standard of review, we uphold agency decisions if supported by substantial evidence, 'notwithstanding their expository shortcomings.' *Pan-Alberta Gas, Ltd. v. FERC*, 251 F.3d 173, 176 (D.C. Cir. 2001)." *Id.* The court nowhere explains why it is free to ignore the FERC's clear, erroneous statement that no argument was offered and find the contrary based upon other far less germane statements in the FERC's order.

There is no expository shortcoming in the Commission's opinion. The FERC's statement is as plain as the English language permits. The FERC did not consider FMPA's arguments because it did not know that the arguments were before it. Rather than accept the FERC's plain statement, the court treats it as meaningless and constructs what it believes to be a supportable opinion out of other fragments of the FERC's order, although these do not contradict the FERC's statement that no argument on the point has been offered.

The court extends the concept of a deferential standard of review to impermissibly permit it to ignore what the agency has clearly stated and to construct a ground for rejecting FMPA's petition for review which was not the Commission's. By its own statement, the Commission did not consider FMPA's arguments so there was no way for the court to know whether, if the Commission had known, it would have looked at FMPA's evidence and argument in the same way. The FERC's admission that it did not know of FMPA's arguments is nowhere contradicted in FERC's order. However, even assuming, *arguendo*, that the court of appeals was somehow correct that other portions of the Commission's decision contradicted its statement that petitioner had presented no argument, the court was required to remand for an explanation by the Commission rather than to select certain segments of the opinion while ignoring a clear statement to the contrary. The court's finding that the FERC knew of FMPA's arguments, when the FERC said that FMPA had not argued the integration of its transmission, requires an act of clairvoyance that is beyond the legitimate role of the reviewing court.

The gravity of the Commission's, or more likely its staff's, failure to be aware of FMPA's arguments is hammered home by the statement of Commissioner, later Chairman, Wood explaining that he was voting against FMPA because of its failure to present its case. Pet. App. F-1 to F-2.[4]

---

[4] There are other strong indications that the FERC would have ruled differently had it been aware of FMPA's evidence. *See, e.g., Remedying Undue Discrimination through Open Access Transmission Service and Standard Electricity Market Design*, 67 Fed. Reg. 55,451 (proposed July 31, 2002) (to be codified at 18 C.F.R. pt. 35) ("SMD-Rulemaking," proposing abandonment of Commission "integration" test and substituting objective test); *Entergy Services, Inc. v. FERC*, 319 F.3d 536

At a minimum, the court should have found it ambiguous whether the FERC did in fact consider FMPA's arguments. A remand was required so that the FERC, rather than the court, could explain the basis of the FERC's decision. *E.g., United States v. Chicago, M., St. P. & P.R. Co.*, 294 U.S. 499, 511 (1935) ("We must know what a decision means before the duty becomes ours to say whether it is right or wrong."); *Chenery Corp.*, 318 U.S. at 87; *Idaho Power Co.*, 344 U.S. at 20; *Morton Salt Co.*, 334 U.S. at 54. It is impossible to tell how the Commission would have resolved the perceived ambiguity. When the court found error or at best lack of clarity and did not remand, it prevented the FERC from correcting its error and reaching its own decision. When the court undertook to itself examine the record to support the agency decision without knowing what the agency would have decided if it had considered FMPA's evidence in light of its arguments, it displaced the Commission.

If the agency's clear statement that it was unaware that petitioner had presented argument is credited, as it should be, remand is required. If there is other language in the FERC's decision suggesting that the FERC was aware of petitioner's argument, there must be a remand to permit the agency to clarify what it meant.

II. SUMMARY REVERSAL IS APPROPRIATE.

To repair basic harm to the settled fabric of the law of judicial review of administrative decisions, this petition should be granted. Indeed, having contravened the most

---

(D.C. Cir. 2003) (Customer-owned facilities connecting generation to the grid entitled to credits); *California Indep. Sys. Operator Corp.*, 103 F.E.R.C. ¶ 61,114 (2003) (customers having generators operating more than half the time charged based on actual transmission use instead of total demand or "load").

basic principles of law that party arguments and evidence must be considered, that agencies must be affirmed only based upon grounds given by the agencies themselves, and that when they find agency error, reviewing courts must remand to the agency so that the agency may correct its error, the court of appeals should be summarily reversed. The court of appeals was required to remand where, to be charitable, it was questionable whether the agency was aware that petitioner had presented any argument on the key issue for agency decision. Summary reversal is thus appropriate. At minimum, the petition should be granted and full review ordered.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

FREDERICK M. BRYANT
General Counsel for FLORIDA
MUNICIPAL POWER AGENCY
Post Office Box 3209
Tallahassee, FL 32315-3209
(877) 297-2012

ROBERT A. JABLON
Counsel of Record
DANIEL I. DAVIDSON
PETER J. HOPKINS
Spiegel & McDiarmid
1333 New Hampshire Ave., NW
Washington, DC 20036
(202) 879-4000